No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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ALEXANDER L. STEVAS,
CLERK

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26, et al.,

Petitioners,

—v.—

STEVEN A. PICO, by his next friend, FRANCES PICO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

This case presents fundamental questions regarding the capacity of a school board to impose ideological and cultural orthodoxy through the control of school library materials. Nevertheless, certiorari review of the case should not be entertained, at this juncture, because the factual record underlying the instant dispute has not yet been fully developed.

Whether the petitioner school board's action, in removing nine books from the school libraries, constitutes the legitimate exercise of the board's authority or the unconstitutional suppression of unpopular ideas, depends on a careful evaluation of the factual context in which the board's action took place. Decisions of the various circuit courts that have reviewed high school book removal cases reveals

the importance that differing factual circumstances play in the resolution of such cases. Indeed, all the circuits that have reviewed such cases have recognized that, under some set of circumstances, the First Amendment might be offended by a decision to remove books from a school library. In this respect, there is no irreconcilable conflict among the circuits. The different results of the court of appeals decisions do not suggest a conflict of law, so much as they reinforce the view that school censorship cases involve delicate constitutional judgments which depend upon a careful assessment of the factual record.

With these considerations in mind the court of appeals remanded the instant case to the district court for a full development of the factual record. Where, as here,

important constitutional issues are at stake, sound and responsible adjudication can only profit from a full and fair exposition of the factual ingredients to the controversy. Under these circumstances, the policy of avoiding premature adjudication of constitutional issues counsels against the granting of the instant writ at this time.

REASONS WHY THE WRIT SHOULD BE DENIED

THIS COURT SHOULD NOT EXTEND ITS DISCRETIONARY REVIEW TO THIS CASE AT THIS TIME. THE POLICY OF AVOIDING PREMATURE ADJUDICATION OF CONSTITUTIONAL ISSUES COUNSELS AGAINST THE GRANTING OF THE INSTANT WRIT.

Although this case presents important First Amendment issues concerning the power of school boards to impose ideological and cultural orthodoxy through their control of library materials, we oppose the granting of certiorari at this time because the factual record underlying this controversy has not yet been fully developed.

This controversy involves the constitutionality of a decision by a local school board to remove eight books from a high school library and one book from a junior high school library.*/ The books were

*/ The book banned from the Island Trees School library was A Reader for Writers, edited by Jerome Archer. The eight books

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physically removed and banned because they contained passages that members of the school board found "inconsistent with the basic values of the community that elected them." 474 F. Supp, 387, 397 (E.D.N.Y. 1979); (A-106).*/ Thus, at bottom, the clash between the school board

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banned from the Island Trees High School library were Slaughterhouse Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories by Negro Writers, edited by Langston Hughes; Go Ask Alice, Anonymous; A Hero Aint Nothing But a Sandwich, by Alice Childress; Soul on Ice, by Eldridge Cleaver and The Fixer by Bernard Malamud. A ninth book to which access was restricted in the High School Library was Black Boy by Richard Wright.

*/ Parenthetical references preceded by "A", are to documents and pagination found in the Appendix to the instant Petition.

and the students in this case is a classic First Amendment confrontation between those who seek to deploy the force of majoritarian institutions to censor unpopular expression and those who seek to express--or to be exposed to--differing perspectives.

It is plain that traditional First Amendment "neutrality" principles prohibit the state from affording greater protection to the views of the majority than the views of the minority, See, e.g., Edwards v. South Carolina, 372 U.S. 229, 237 (1963), Police Dept. of the City of Chicago v. Mosley,408 U.S. 92 (1972). The present controversy is complicated, however, by the fact that it takes place in an institution--the public schools--that has, as one of its recognized goals, the transmittal and perpetuation of societal values. As stated in the opinion below: "the application of the prohibitions of the First Amendment to secondary school

education presents complexities not encountered in other areas of government activity." 638 F. 2d 404, 412 (1980); (A-18).

Nevertheless, while recognizing the historic inculcative function of public education, this Court has been careful to point out that the authority of the state and of school boards, in these respects, is not unlimited. At least two alternative doctrinal traditions suggest formidable First Amendment limitations upon the censorial authority of school boards. First, in a line of cases, ranging from Meyer v. Nebraska, 262 U.S. 390 (1923) and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Epperson v. Arkansas, 393 U.S. 97 (1968) to Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), this Court has grappled with the tension between the

First Amendment's commitment to the heterogeneity of ideas and the existence of a public education system with responsibility to inculcate societal values. In resolving that tension, this Court has insisted that, whatever may be the inculcative authority of the state or of the local school boards, "the First Amendment...does not tolerate laws [or policies] that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents, supra at 603.

This doctrinal tradition has forceful application to the instant controversy. Plaintiffs believe that after the facts of this case have been fully developed at trial, it will be apparent that the actions of the Island Trees school board grew out of a desire to impose an orthodoxy of values and beliefs.

There is also a second doctrinal tradition that is applicable to the case at

bar. That doctrine mandates that, "[p]recision of regulation must be the touchstone" where First Amendment interests are at stake. N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963). This Court has repeatedly observed that, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 433. These concepts have given rise to a "First Amendment overbreadth" doctrine requiring that precise substantive criteria and regularized procedural mechanisms be employed by any governmental entity that seeks to censor expression. See Freedman v. Maryland 380 U.S. 51 (1965); Hamling v. United States, 418 U.S. 87 (1974). Writing for the Court below Judge Sifton noted "the erratic, arbitrary and free-wheeling manner in which the defendant school

officials proceeded in this case." 638 F. 2d at 416; (A-28). Again, after this case has been fully developed at trial the school board's violation of "First Amendment overbreadth" requirements will also be manifest.

At this procedural interval, however, no full factual development of this case has been undertaken. The case was submitted to the district court upon cross-motions for summary judgment. The district court granted judgment for the defendant school board by dismissing plaintiffs' complaint. The court of appeals reversed and remanded for trial. In so doing, the court noted the "unusual number of potentially conflicting values which compete for attention in matters relating to secondary education" and the First Amendment. 638 F. 2d at 413; (A-19).

Accordingly, Judge Sifton, writing the majority opinion, observed that in adjudicating issues involving the application of the First Amendment to school matters, it is important "to proceed with caution to consider not just the general outlines, but the specific facts of the case...." 638 F. 2d at 413; (A-20).

Judge Newman, concurring in the result, was even more explicit in requiring a fuller factual record:

> "A trial is required to determine precisely what happened, why it happened, and whether, in the circumstances of this case, the school board's actions, looking forward from the time they were taken, created a sufficient risk of suppressing ideas to constitute a violation of the First Amendment." */ 638 F. 2d at 438; (A-79-A-80).

*/ Facts, which might be developed and which would address the nature of the

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Thus, the constitutional doctrines that inform the present controversy suggest that a delicate balance is at work here. While school officials can and do foster certain majoritarian values, what they cannot do is foster majoritarian values by eliminating

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school board's oppressive and intimidating behavior, include the following:

(1) The firing of the Superintendent of schools for opposing the Board's book removal policy;

(2) The intimidation of librarians who opposed book removal;

(3) The methods the Board employed to marshal community support including a poll conducted by mail;

(4) The Board's formal and informal contacts with conservative organizations such as Parents of New York United, an affiliate of the Heritage Foundation;

(5) The views of Board members other than Ahrens and Martin whose testimony was exclusively relied on by defendants;

(6) The proceedings at Board meetings at which the issue of book removal was discussed;

(7) The circumstances surrounding the Board's rejection of the recommendation of the Book Review Committee which urged retention of several of the books; and

(8) The proposed methods of disciplining teachers and students who violated the book ban.

conflicting values. To do that is to impose a "pall of orthodoxy." And the precise contours and texture of such a pall can only be discerned upon a full evidentiary record. Similarly, the First Amendment requirements of procedural regularity and specificity may vary with the factual circumstances.

These considerations suggest that it would be premature for the Court to grant certiorari to the instant case in its present posture. A trial of the instant dispute is necessary to fully develop the factual record in this case. And only after the facts have been fully developed would the courts be in a position to fully and fairly adjudicate the delicate constitutional questions presented. For this reason respondents urge that the Court deny the instant petition.*/

*/ An examination of the decisions of the various circuit courts that have entertained

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The policy of avoiding the premature adjudication of constitutional issues has a deep and venerable tradition in this Court. Rescue Army v. Municipal Court, 331 U.S.

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high school book-banning cases reveals the importance that differing factual circumstances play in the resolution of such cases. All the circuits that have reviewed such cases have recognized that, under some set of circumstances, the First Amendment might be offended by a decision to remove books from a school library. In this respect, there is no irreconcilable conflict among the circuits. The different results of the Court of Appeals decisions have turned upon differing factual contexts in which each of the book-banning decisions has taken place. Compare Minarcini v. Strongsville City School District, 541 F. 2d 577 (6th Cir. 1976) and Pico v. Board of Education, 638 F. 2d 404 (2nd Cir. 1980) with Cary v. Board of Education, 598 F. 2d 535, 544 (10th Cir. 1979) and Zykan v. Warsaw Community School Corp., 631 F. 2d 1300, 1305-1306 (7th Cir. 1980). Thus the different outcomes within the circuits do not suggest a conflict of law so much as they reinforce the view that school censorship cases, such as that at bar, involve delicate constitutional judgments which depend upon a careful assessment of a full and complete factual record.

549 (1947); Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Company, 389 U.S. 327 (1967); Parker v. County of Los Angeles, 338 U.S. 327 (1949); Cowgill v. California, 396 U.S. 371 (1970). Indeed, out of deference to that tradition the Court quite recently vacated a grant of certiorari review and dismissed the writ in Minnick v. California Department of Corrections, ___U.S.___, 49 U.S.L.W. 4609 (June 1, 1981).

As in the case at bar, Minnick involved difficult and controversial constitutional questions and important issues of social policy.*/ As in the case at bar, resolution of the constitutional questions posed by Minnick involved careful sifting of the factual record. As in the case at bar, this

*/ Minnick involved a "reverse discrimination" suit challenging the constitutionality of California's affirmative action program for correctional officers.

Court had been asked to entertain certiorari review of the controversy before all of the facts were fully examined at trial. Accordingly, in Minnick this Court dismissed its original writ of certiorari as improvidently granted. Writing for the Court, Justice Stevens suggested that further proceedings in the trial court might ultimately reduce 'the underlying constitutional issues [to] clean-cut and concrete form.' Id. at 4614.

The policy considerations underlying the Minnick decision are sound. One set of considerations involves a recognition of "the unique place and character, in our scheme [posed by the Court's capacity to engage in] judicial review of governmental action for constitutionality." Rescue Army v. Municipal Court, supra at 571. See also Justice Brandeis' opinion (dissenting in part) in Ashwander v. Tennessee Valley Authority.

297 U.S. 288, 341 (1936) and Bickel, The Least Dangerous Branch (1962).

A second set of considerations involves the quite obvious proposition that sound judicial decisionmaking is enhanced by evaluating legal principles in the context of concrete and specific factual situations. See, e.g. Watson v. Buck, 313 U.S. 387, 402 (1941).

Where, as here, important constitutional issues are at stake, sound and responsible constitutional adjudication can only profit from a full and fair exposition of the factual ingredients to the controversy. Without a trial, it would be premature for this Court to entertain now the important issues raised by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in the above-styled matter, should be denied.

Respectfully submitted,

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